No. 21811

United States
COURT OF APPEALS
for the Ninth Circuit

JACKSON MORGAN,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF

This is an Appeal from the Judgment and Conviction of the United States District Court for the Western District of Washington Northern Division

THE HONORABLE WILLIAM J. LINDBERG
Judge Presiding

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STATEMENT OF JURISDICTION

The Court of Appeals for the Ninth Circuit has jurisdiction of the appeal in this cause by virtue of Section 1292 (a) (1) of Title 28 United States Code, and/or Section 110 of Title 29 United States Code.

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules

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STATEMENT OF THE CASE

Defendant was charged in a six count indictment, two counts each of violation 21 U.S.C. 174, 26 U.S.C. 4704 (a) and 26 U.S.C. 4705 (a), one count each on or about March 21, 1966 and one count each on or about April 11, 1966; was duly arraigned and en-

tered pleas of not guilty to each count. Trial was set for January 4, 1967 and commenced on that date. A verdict of guilty was returned by the jury on each count of the indictment on January 4, 1967, and on January 27, 1967, judgment and sentence was pronounced and imposed on Counts I, II, III, IV, V, and VI. Defendant appealed from the judgment and sentence rendered.

STATEMENT OF FACTS

First witness produced by the Government was Joseph Gordon, a King County Deputy Sheriff and testified he was on loan to the Narcotics Division from the Sheriff's Office (Tr. 42-43) and who was at the time of trial a Federal Narcotics Agent (Tr. 42-43). That he first met Jackson Morgan in an apartment in Seattle (Tr. 44). That he received a telephone call March 21, 1966 from Jackson Morgan (Tr. 45) and that he would be in Seattle in about 3 hours. He called Agent Ferro and Agent Ferro and Agent Parrish came to his home (Tr. 48). Agent Ferro gave Agent Gordon $700.00 in advance funds (Tr. 48) and that later Gordon received a call from Jackson Morgan who told him to meet him at the Union 76 station (Tr. 49). Gordon went to the station and Jackson Morgan got in his car (Tr. 50) and Morgan asked him if he wanted two and Gordon told him to give him two pieces (Tr. 50). Morgan took a rubber container from his pocket and handed it to Gordon, who handed Morgan $700.00.

The material was delivered to the United States Chemist (Tr. 59).

On April 11, 1966, Gordon received a call from Morgan (Tr. 59) stating that he had two for him and he left a number for Gordon to call him. Gordon called Agent Ferro and got $350 in advance funds from him (Tr. 62). Gordon called Morgan back (Tr. 62) and said that he only had $350 and Morgan asked if he had a scale so that he could split it. Deputy Gordon stated that he did not have and gave Morgan a phone number, which was the Bureau of Narcotics under cover number, to call him when he was ready (Tr. 62). Later, Gordon got a call from Morgan, who said he was ready and that he was to meet him in the same place he had met him before (Tr. 63). That he got in the vehicle of Morgan and that there was another rubber container on the seat and that he picked it up and gave him $350 (Tr. 64). That he asked Morgan if he could adulterate it and that Morgan said he could add two spoonfulls if he wanted to ruin his customers (Tr. 64). The witness was allowed to testify over objection that Exhibit 2 contained no revenue stamps (Tr. 65), the same witness was allowed to testify that Exhibit 1 had no revenue stamps, over objection, that the Exhibit spoke for itself.

Agent Ferro testified that he saw Jackson Morgan enter the car of Agent Gordon (Tr. 81) and that Gordon gave Ferro a rubber cundrum containing a powdery substance (Tr. 83), Exhibit 1, and that he

delivered Exhibit 1 to the chemist (Tr. 85). That Agent Gordon delivered to him Exhibit 2 (Tr. 89).

The Court refused to allow the defendant to cross-examine Agent Ferro about a Harvey Edwards, a government informant, who according to the state's testimony in the case, introduced Gordon to a man named Ely, who in turn introduced the defendant to Gordon. Harvey Edwards having been a narcotics informant working with the bureau, who was under a similar charge. The defendant having contended in its opening statement, that the narcotics that were recovered by the government were obtained through Harvey Edwards. An offer of proof was made and rejected (Tr. 94-99).

The chemist testified that heroin hydrochloride is manufactured from morphine and that morphine is extracted from opium poppies (Tr. 117-118). That the poppies grow in the United States and that it is a fairly simple operation to extract the morphine and to manufacture the heroin from the poppies that grow in the United States and that in examining the material he could not determine if it was made in the United States (Tr. 119). The poppies grow in a temperate climate and they grow in the United States. That samples had been submitted from various parts of the United States to him and that they grow in Florida, Texas, California and parts of New Mexico and Arizona.

The Deputy United States Attorney, in his closing argument (Tr. 141) allowed that the poppies could

have been grown in the United States and the heroin could have been produced in the United States, but that the jury still had a duty to find the defendant guilty of knowing that they had been imported illegally into the United States because of presumption of law. This, whether or not they had been imported legally, or not (Tr. 141-142).

The Defense objected to failure to give requested Instruction No. 2, and also objected to the instruction as to the presumptions.

SPECIFICATION OF ERRORS

1. The court erred in limiting cross-examination of Agent Ferro concerning Harvey Edwards and in denying the introduction into evidence of information concerning Harvey Edwards, which was presented by defendant's offer of proof (Tr. 93-99).

2. The court erred in restricting cross-examination of Agent Gordon about Harvey Edwards (Tr. 69-74).

3. The court erred in denying defendant's motion for judgment of acquittal as to Counts I, II, III & IV (Tr. 122-124).

4. The court erred in instructing the jury that possession of narcotic drugs by the defendant was sufficient to raise a presumption that the narcotic drugs had been illegally imported into the United States and that the defendant knew that it had been illegally imported to the United State. And, by in-

structing the jury that a presumption is raised by possession of narcotics not bearing a revenue stamp that the narcotics did not come from the original stamped envelope (Tr. 166-169, 180).

5. The court erred in failing to give defendant's requested Instruction No. 2 and in giving the same in a modified form (Tr. 180).

SPECIFICATION OF ERROR NO. 1

The court erred in limiting cross-examination of Agent Ferro concerning Harvey Edwards and in denying the introduction into evidence of information concerning Harvey Edwards, which was presented by defendant's offer of proof wherein the following occurred (Tr. 93-99):

"Q. Now, do you know Edward—Harvey Edwards?

A. Yes, sir.

Q. And was he employed by the Narcotics Bureau?

MR. SWOFFORD: Objection, your Honor. I don't think there has been any testimony.

THE COURT: I will sustain the objection.

MR. HERNDON: Your Honor, we will make this witness our witness for this purpose.

THE COURT: All right.

By Mr. Herndon:

Q. (Continuing) Now, this Harvey Edwards, he is a narcotic user, is he not?

MR. SWOFFORD: Objection, your Honor, for the same reason.

THE COURT: Well, it may be—I will overrule the objection at this time.

By Mr. Herndon:

Q. (Continuing) He is an addict, isn't he?

A. Yes, sir, he was an addict.

Q. And at the time of the case you had charges pending against him, didn't you?

A. No, sir.

Q. Had they been disposed of?

A.Yes, sir.

Q. He had been charged, is that right?

A. A complaint was filed against him.

Q. And for what?

A. For possession of narcotics.

Q. And that case was dismissed?

A. It was dismissed for insufficient evidence.

Q. I see: and so then he went to work for you after it was dismissed for insufficient evidence?

MR. SWOFFORD: Objection, your Honor.

THE COURT: Well, you will have to make a showing of what you expect to prove here.

MR. HERNDON: Well, your Honor, I outlined in my opening statement what we expected to prove.

THE COURT: I know but the connection here is - -

MR. HERNDON: (Interposing) Your Honor, if I may go a little further, of course, this is within the knowledge of these agents. I am somewhat familiar with some of the background. I think that we can show that, through this witness I am hopeful we will be able to show, through this witness, that Harvey Edwards is the party that the government employed and paid funds to, out of whatever funds they pay

him, and used him to introduce them to the Defendant in this case, and it boils down to a question of the situation — it gets down to the word of the detective and the narcotics agents.

THE COURT: Introduced who to the Defendant?

MR. HERNDON: I believe that Harvey Edwards introduced the deputy sheriff.

THE COURT: Well, of course, you have to ask the deputy sheriff that question.

MR. SWOFFORD: There has already been testimony.

THE COURT: I think he said he had nothing to do with this case. That is my recollection.

MR. SWOFFORD: Right; he said he was introduced to the Defendant by Mr. Ely, as I recall.

MR. HERNDON: Well, your Honor, may I make an offer of proof in the absence of the jury to preserve my record?

THE COURT: All right. Members of the Jury, I will excuse you briefly so that the defendant may make an offer of proof here which is something that should be made outside the presence of the jury and, if the court determines it is admissible, why then it will either be read to you or it will be repeated, one or the other.

You may now be excused and bear in mind the admonition I gave you earlier. This will be a brief recess, I think.

(Whereupon, the jury retired from the courtroom.)

THE COURT: You might ask the question, if you wish.

MR. HERNDON: Yes.

THE COURT: And make your offer in that

fashion.

MR. HERNDON: Yes, your Honor, thank you.

Now, Officer—first of all, was this Harvey Edwards an informant in connection with aspects of this case?

THE WITNESS: Yes, he was.

MR. HERNDON: And was he paid by the Bureau of Narcotics?

THE WITNESS: No, sir.

MR. HERNDON: Are you in charge of the payment of those funds?

THE WITNESS: No, sir. If I could add, if I paid an informant I would then be in charge of the payment but the payments to any informants are controled by the district supervisor.

MR. HERNDON: The reason I ask you this question is my recollection in the previous case is you or one of your agents testified he was on the payroll in another case.

THE WITNESS: No, sir.

MR. HERNDON: All right; in any event, he was working in coordination with your Department; is that correct?

THE WITNESS: Yes, sir.

MR. HERNDON: And he agreed to do this at a time when you had a charge pending against him, is that correct?

THE WITNESS: Yes, sir.

MR. HERNDON: Now, did you or did you not have him, arrange to have him introduce the Sheriff Gordon to the Defendant?

THE WITNESS: No, sir.

MR. HERNDON: Did you have him introduce Sheriff Gordon to anyone?

THE WITNESS: Yes, sir.

MR. HERNDON: To whom?

THE WITNESS: Frank Ely.

MR. HERNDON: To a Frank Ely?

THE WITNESS: Yes, sir.

MR. HERNDON: And at the time he met Frank Ely, did he also meet this Defendant?

THE WITNESS: No, sir.

MR. HERNDON: It is your testimony that this Defendant was not present with Frank Ely and Mr. Harvey and Detective Gordon sofar as your records reveal?

THE WITNESS: Yes, sir.

MR. HERNDON: So that the only thing, sofar as you know, was he did introduce a Frank Ely to Detective—to Sheriff Gordon?

THE WITNESS: That is correct.

MR. HERNDON: I think that is as far as our proof will go and I will submit to the Court that this will be admissible because the Government has brought out in their case that Gordon's testimony was that he met Ely, he met Jackson through Ely, and this would complete the chain.

THE WITNESS: You said in the presence of the informant before.

MR. SWOFFORD: The informant is completely out of this case.

THE WITNESS: You asked me if the Deputy had met Jackson Morgan in the presence of the informant and I said no.

MR. HERNDON: But we have testimony, earlier testimony, that Gordon was introduced to Jackson Morgan by Frank Ely; so, it would then be admissible to show that Ely met the Gordon through his informant.

THE COURT: It is pretty remote, I think.

MR. SWOFFORD: It is, very.

THE COURT: You can make your offer and I will reject the offer.

MR. HERNDON: Very well.

THE COURT: Are you through then?

MR. HERNDON: That is all the questions I have. Well, I have a couple of more questions.

THE COURT: On cross examination or direct?

MR. HERNDON: On cross examination.

THE COURT: Then when they come back we will be on cross examination."

SPECIFICATION OF ERROR NO. 2

The court erred in restricting cross-examination of Agent Gordon about Harvey Edwards wherein the following occurred (Tr. 69-74):

"Q. Now, do you know a Harvey Edwards?

A. Yes, sir, I do.

MR. SWAFFORD: Your Honor, I object to anything about him. I don't think anything was mentioned of that name on direct examination.

THE COURT: Well, it would appear so. Of course, you can make him your own witness, if you desire. If, in some respect, you state it is relevant I will accept your representation. Ordinarily, it would seem to me, you would bring it in as part of your own case in conection with your own witnesses, but you can make him your own witness, if you wish to.

MR. HERNDON: Your Honor, I intended to question this witness concerning his meeting of—

THE COURT: (Interposing) Well, you might proceed and I will see how far you go with it

and then you can renew your objection.

By Mr. Herndon:

Q. Now, this Mr. Harvey Edwards, was he employed by the Bureau of Narcotics at that time?

A. Do you mean was he on the payroll, sir?

Q. Was he receiving advance funds? He was, wasn't he?

A. No, sir.

MR. SWOFFORD: We object, your Honor. Again I can't see that this is relevant to any inquiry.

THE COURT: I will sustain the objection. I will sustain the objection to the last question.

By Mr. Herndon:

Q. Now, Deputy, where did you meet Harvey Edwards?

First—I will rephrase that—did you meet Harvey Edwards in connection with this case to which you were assigned?

A. Which case, sir?

Q. This general investigation you were conducting?

MR. SWOFFORD: I would object.

A. You will have to rephrase the question, sir.

MR. SWOFFORD: I can't see where it is relevant.

THE COURT: I will sustain the objection to the question as phrased.

By Mr. Herndon:

Q. Now, did you ever discuss with Harvey Edwards, Jackson Morgan?

A. No, sir, I did not.

Q. you had no conversation with Harvey Edwards about Jackson Morgan?

A. No, sir.

Q. Do you know where Harvey Edwards is new?

A. No, sir, I have no idea.

MR. HERNDON: Your Honor, we will ask that this witness be held.

THE COURT: He will be available, I assume.

THE WITNESS: Yes.

THE COURT: Is that what you mean by being available.

THE WITNESS: Yes.

MR. HERNDON: I better ask a couple of more questions.

THE COURT: All right.

By Mr. Herndon:

Q. Officer, now you have identified this material by your initials, is that correct?

A. Yes, sir.

Q. And now these advance funds, you have testified that advance funds are used to purchase narcotics, is that right?

A. Primarily, sir.

Q. And they are also used to pay informers?

A. No, sir.

MR. SWOFFORD: Objection; I don't think we have any testimony about informants here, your Honor.

THE COURT: Well, he answered the question.

By Mr. Herndon:

Q. Do you use different funds to pay informers MR. SWOFFORD: Your Honor —

THE COURT: (Interposing) I will sustain an objection to that question.

MR. HERNDON: Your Honor, for the purpose —

THE COURT: (Interposing) You can make him your own witness, if you want to, but this is not properly a part of cross examination. I think under objection before he answered the question and you pursued it further and I think the objection is properly taken.

By Mr. Herndon:

Q. (Continuing) Is it your testimony, Officer, that there is no informant involved in this case?

MR. SWOFFORD: Objection, your Honor. The issue here in this case is whether —

THE COURT: (Interposing) If you want to ask him the question, I don't think he has so testified yet.

By Mr. Herndon:

Q. (Continuing) Is there an informant involved in this case?

A. I have no knowledge of that, sir.

Q. You had no knowledge of any informant?

A. Not in this particular case.

MR. HERNDON: May I have a minute to look at the Jencks' Rule statement, your Honor?

THE COURT: Yes.

(Brief pause.)

MR. HERNDON: Just one more question.

By Mr. Herndon:

Q. Have you read — do you know what a Jencks' Rule statement is, Officer? A statement furnished, in this case furnished to the Defense, prior to trial?

A. Kind of vaguely.

THE COURT: Statement of a witness.

A. (Continuing) Vaguely.

By Mr. Herndon:

Q. Have you seen the witnesses' statement in this case?

A. Yes, sir.

Q. Have you seen the statement of Agent Joseph Ferro?

A. Yes, sir.

Q. Does that refer to an informant, or do you recall?

MR. SWOFFORD: Your Honor, I don't think this witness can be cross examined on a statement of a witness that government plans to call later.

THE COURT: I will sustain the objection."

ARGUMENT

These two assignments of error are being consolidated for argument purposes because the same issue is involved in both. It is conceded that the extent of cross-examination and the determination as to whether or not evidence is relevant is within the sound discretion of the trial court. The court allowed, in the case of Agent Ferro and Agent Gordon, the defendant to make the witnesses its own witnesses, so that the question of whether or not the propounded questions were within the scope of direct examination is not the issue, but the issue is as to whether or not the testimony should have been allowed into evidence, either in form of evidence elicited by cross-examination or in the form or part of the defendant's evi-

dence elicited by making the witness the defendant's witness rather than the plaintiff's.

It is respectfully submited that the questions and answers proposed in defendant's offer of proof as set forth above were relevant. The defense contended in its opening statement that the case centered around Harvey Edwards and that Edwards was involved in some manner with Deputy Gordon. That Harvey Edwards introduced Jackson Morgan to Deputy Gordon (Tr. 37-38) and that the defendant had come to Seattle to do some business with Deputy Sheriff Gordon and that if there were any narcotics obtained they came from Edwards who was a narcotics addict and had been charged and convicted of narcotics violations. On the other hand in his testimony Deputy Sheriff Gordon claimed that he had been introduced to the defendant by a man by the name of Frank Ely (Tr. 44). It is submitted that we had the right to pursue the matter under cross examination to determine whether or not Gordon was in fact introduced to the defendant by Harvey Edwards and to explore whether or not this was a possible source of the narcotics contained in Exhibit 1 and 2, which the Government claimed were obtained from the defendant. The same holds true as to the questions and answers asked of Officer Ferro who was in charge of the investigation and the jury was entitled to hear the witnesses answer the questions and observe these witnesses when the questions asked and answers given to determine the credibility of the witnesses. One of the important aspects of cross examination regardless of

what the witnesses' answer may be, is for the jury to observe the witnesses in answering the questions so that their demeanor, facial expressions and voice can be observed and heard and it is respectfully submitted that the testimony which was rejected above by our offer of proof should have been heard by the jury. It is respectfully submitted that this limitation as to the admissibility of this testimony by the court and the restriction on the cross-examination materially affected the defendant's case as to all of the counts of the Indictment.

SPECIFICATION OF ERROR NO. 3

The court erred in denying defendant's motion for judgment of acquittal as to Counts I, II, III & IV, wherein the following occured (Tr. 122-124):

"MR. HERNDON: May it please the Court, your Honor, I would like to make a motion.

THE COURT: All right, go ahead.

MR. HERNDON: The Defendant will move the Court at this time for a directed verdict of acquittal as to Counts I, II, III, IV, V and VI.

THE COURT: That is all there are.

MR. HERNDON: And VI of the Indictment for the failure of the Government to prove all of the allegations of each one of these Counts.

One of the allegations of the Counts I, II—I and II and —I and II is that it was unlawfully —knowing it to have been unlawfully imported into the United States contrary to law.

I am aware that there is a statutory presumption. However, by the statute you can't

make a dog a cat or change something from what it normally or naturally is and the presumption is not based upon any facts that gives rise to a presumption. The evidence here from the Government Chemist is that you can't—that it can be produced in this Country and we know that sometimes it is produced in this Country and the Government's jurisdiction in this type of case is based upon its being imported into this Country in violation of the law. It isn't a logical deduction and I know that the court in the past has upheld the existence of this presumption but we respectfully submit to the Court that it isn't based on logical reasoning and that the statute which gives rise to this presumption is also unconstitutional as it would have to be applied to the facts in this case in order to sustain it.

As to Count III there is no showing that this container is in its original stamped envelope because there is no showing what one of these stamps looked like and there is no evidence at all as to what one of these stamps are or what kind of container—what is the original container.

The same is true as to Count IV.

Your Honor, as to Count V and VI, I think the Government has introduced evidence in connection with each one of those.

THE COURT: Very well, the motion will be denied."

ARGUMENT

As to Counts I and II, it is respectfully submitted that the presumption created by the statute which in substantial part is as follows:

Title 21 U.S.C., Section 174 reads, in substantial part, as follows:

> "Whoever knowingly imports any narcotic drug into the United States, or receives, conceals buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported, knowing the same to have been imported or brought into the United States contrary to law, shall be imprisoned not less than five or more than 20 years, and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this Section, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

It is unconstitutional in that it raises a presumption that the narcotics in the possession of the defendant were unlawfully imported to the United States and that the defendant knew this. The testimony is clear in this case from the government witnesses that the narcotics in question could have been produced from poppies grown in the United States and that from time to time the chemist had examined narcotics produced from poppies grown in various parts of the United States.

We are aware of the decision in *Williams* v. *U. S.*, 290 F.2d 451 cited by the Ninth Circuit. However, it is respectfully submitted that the Court should review the question of the constitutionality of the presumption created by the statute. It is difficult to understand how the law can be constitutional when it is against the reason and logic to say that from the existence of possession of narcotics that a person knows that they were illegally imported to the United States when such a product can be produced in the United States and at least in some cases is going to be absolutely contrary to the facts of the case.

As to Counts III and IV, which are charges of violating Title 26, 4704 (a), which in part reads as follows:

> "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs, except in the original stamped package or from the original stamped package and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

In conection with Counts III and IV, again we have a presumption that has been upheld in *Smith* v. *U.S.*, 273 F.2d 462, it is respectfully submitted, however, that in this case such a presumption is unconstitutional in that the statute says "in or from the original stamped package." There is no showing that these were not from an original stamped package.

The statute simply states this fact to be so in order to give the federal court jurisdiction. When in fact, and in truth, in many cases the material could come from an original stamped package. The only way this can be rebuted in the case in point was to require the defendant to testify in violation of the Fifth Amendment to the Constitution that both statutes set forth above creates presumption that require a defendant to produce evidence and in many instances to testify. This is contrary to our constitution and our basic philosophy that a defendant need not prove anything and that the burden of proof is on the State and the defendant should not be required to testify.

SPECIFICATION OF ERROR NO. 4

The court erred in instructing the jury that possession of narcotic drugs by the defendant was sufficient to raise a presumption that the narcotic drugs had been ilegally imported into the United States and that the defendant knew that it had been illegally imported to the United States, wherein the following occurred (Tr. 166-167, 169, 179-180):

> "I instruct you that as to Counts I and II that although the Defendant is charged with concealing and selling a quantity of narcotic drugs it is not necessary for the United States to prove that the Defendant did both of the acts charged but it is only necessary that the United States prove that the Defendant did conceal or sell.
>
> In Section 174, with which we are concerned in Counts I and II, there is this further provision which I will read:

> 'Whenever on trial for a violation of this section the Defendant is shown to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the Defendant explains the possession to the satisfaction of the jury.'

The statute just read does not change the fundamental rule that the Defendant is presumed innocent until proved guilty beyond a reasonable doubt, nor does it impose upon the defendant any burden or duty to produce proof that narcotic drug was imported, or any other evidence. As previously stated, the burden is always upon the prosecution, that is the government, to prove beyond a reasonable doubt every essential element of the crime charged. What the statute means, the portion I have just read, is that upon a trial for a violation thereof, if the Jury should find beyond a reasonable doubt that the defendant has had possession of the narcotic drug as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the narcotic drug was imported or brought into the United States of America contrary to law, and to draw the further inference and find that the defendant had knowledge that the narcotic drug was imported or brought in contrary to law.

In conection with any explanation offered for possession of a narcotic drug, you are reminded that in the exercise of a Constitutional right the Defendant need not testify. Possession may be explained to the satisfaction of the jury through

other circumstances and other evidence in the case independent of the testimony of a defendant.

In connection with any explanation offered for possession of any narcotic drug, you are again reminded that in the exercise of his Constitutional rights a defendant need not testify. Possession may be explained to the satisfaction of the jury through other circumstances and other evidence in the case independent of testimony of the accused.

MR. HERNDON: And we object to, although the Court has to some degree covered this, the giving of our Requested Instruction Number Ten in a modified form and in connection with the objection, your Honor, we have objection to the Court having read the statute which says that possession is — raises a presumption and inference that the Defendant knew that the drug was unlawfully, imported into the United States.

And, by instructing the jury that a presumption is raised by possession of narcotics not bearing a revenue stamp that the narcotics did not come from the original stamped envelope wherein the following occurred (Tr. 167-169, 180):

"Also, with respect to Counts IV and V—III and IV, rather, Section 4704 (a) of Title 26 of the United States Code provides that the proof of:

'The absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this section by the person in whose possession the narcotic drugs may be found.'

Prima facie evidence of a violation means such evidence as would warrant a verdict of guilty unless overcome or outweighed by the other evidence in the case. That is to say, unless the evidence in the case leads the jury to a different or contrary conclusion.

However, this statute does not change the fundamental rule that the accused is presumed innocent until proved guilty beyond a reasonable doubt, nor does it impose upon a defendant the burden or duty to produce proof that the narcotic drug tax was paid as required by law, or any other evidence. As previously stated, the burden is always upon the prosecution to prove beyond a reasonable doubt every essential element of the crime charged. What the statute means is that, upon a trial for a violation thereof, if the jury should find beyond a reasonable doubt from the evidence in the case that the defendant has had possession of the narcotic drugs, not bearing the tax paid revenue stamps required by law as charged, the fact of such possession alone, unless explained to the satisfaction of the jury by the evidence in the case, permits the jury to draw the inference and find that the narcotic drug was distributed in or from an unstamped package as charged and to draw the further inference and find that the defendant had knowledge that the narcotic drug was distributed in or from a package not bearing the tax paid revenue stamps required by law as charged in the Indictment.

MR. HERNDON: But we object to the reading of the statute requiring the Defendant—the

statute saying that the Defendant has to produce evidence as to—or explain the possession.

We feel that the statute is unconstitutional and that the inference—that it does not lead to the inference that it directs the jury to draw from mere possession, and we object to the same, our request that is in Instruction Number Eleven, we object to the Court giving that in a somewhat modified form and we also object to the instruction as to the inferences, the instruction the Court gave as to the inferences that could be drawn from the absence of a stamp and from not being in its original form.

THE COURT: Very well."

ARGUMENT

The exception as to the two different instructions concerning the presumptions are compiled into one objection because the same issue of constitutionality is raised.

The argument asserted as to the court's failure in allowing the directed verdict or judgment of acquittal as to Counts I, II, III & IV is again asserted in connection with the court's instructions in that the presumption raised by the statutes are unconstitutional.

SPECIFICATION OF ERROR NO. 5

The court erred in failing to give defendant's requested Instruction No. 2 and in giving the same in a modified form, which requested Instruction No. 2 reads as follows:

REQUESTED INSTRUCTIONS NO. 2

"Every witness is presumed to speak the truth. This presumption may be overcome by the manner in which he or she testifies, by the character of his or her testimony, by evidence effecting his or her character or motive, or by contradictory evidence.

"A witness shown to be false in part of his or her testimony is to be distrusted in others. Therefore, if you find that any witness has wilfully sworn falsely to any part of his or her testimony, you have the right to distrust the other portions thereof. You are instructed that if the consideration of all the evidence in this case the same is acceptable of two conclusions or two constructions, one consistent with the guilt of the defendant and the other consistent with his innocence, then you are to adopt that construction or conclusion which is most consistent with his innocence."

State v. Leland, 190 Or 598.

ARGUMENT

Although the court gave a portion of defendant's Instruction No. 2 in modified form, the court did not instruct the jury, which the defendant contends is the law,

"You are instructed that if from consideration of all the evidence in this case the same is acceptable of two conclusions or two constructions, one consistent with the guilt of the defendant and the other consistent with his innocence, then you are to adopt that construction or

conclusion which is most consistent with his innocence."

and we feel that the failure to give this instruction is prejudicial in that the jury in applying this principal of law, had they been so instructed, might have reached another conclusion as to one or all of the counts.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court should grant the defendant a new trial.

Respectfully submitted,

JULIAN HERNDON, JR.,
HERNDON & WHITNEY,
Of Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JULIAN HERNDON, JR.
Of Attorneys for Appellant